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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B7

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2010

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Z Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying sustained investment in a new commercial enterprise. The director certified the decision denying the petition to the AAO pursuant to 8 C.F.R. § 103.4 and advised the petitioner that he was afforded 30 days in which to submit a brief to this office.

In response, counsel submits a brief and additional evidence. For the reasons discussed below, the employment generating enterprise, a restaurant built in 2006, fits the regulatory definition of "new" notwithstanding the establishment date of the franchise. Thus, we withdraw the director's conclusion that the commercial enterprise in this matter is not "new." While we find that the accountant's explanation for the reduction in capital as losses rather than withdrawals is consistent with the schedules K-1 submitted in this matter, we uphold the director's concern that the petitioner did not maintain his investment based on a $1,000,000 transfer from the commercial enterprise to the petitioner on June 28, 2007. Finally, the petitioner's 2008 schedule K-1 for the employment generating entity, submitted on appeal, suggests that it may no longer be a wholly owned subsidiary of the new commercial enterprise identified on the petition.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, [redacted] not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000.

NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part, that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a *new* commercial enterprise" (Emphasis added.)

The regulation at 8 C.F.R. § 204.6(e) defines "new" as established after November 29, 1990.

The regulation at 8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
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> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
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> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. This amendment did not, however, eliminate the requirement that the commercial enterprise be "new." Thus, we find that 8 C.F.R. § 204.6(h) is still relevant for commercial enterprises established by the petitioner or someone else prior to November 29, 1990.

The petitioner indicated on the petition that the new commercial enterprise was established on March 31, 2006. This date is the establishment date listed on the State of Florida's electronic records,

submitted by the petitioner, and on [redacted] Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income.

While [redacted] was organized in 2006, it is the job creating enterprise that must be examined in determining whether a new commercial enterprise has been created. *Matter of Soffici*, 22 I&N Dec. 158, 166 (Comm'r. 1998). The main employment generating entity is [redacted] This company was organized on March 21, 2006.

The regulation at 8 C.F.R. § 204.6(e) provides:

> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of **a holding company and its wholly-owned subsidiaries**, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

(Bold emphasis added.)

Thus, in order to consider [redacted] part of the new commercial enterprise, it must be a wholly-owned subsidiary of [redacted] The record establishes that [redacted] was initially owned by the petitioner and [redacted] the members of [redacted] On December 31, 2007, however, they transferred their interest to [redacted] Thus, as of the date of filing in August 2008, [redacted] was a wholly-owned subsidiary of [redacted] and may be considered part of the new commercial enterprise. That said, on appeal, the petitioner submits the petitioner's Form schedule K-1 for [redacted] reflecting that the petitioner once again owns capital in [redacted] If true, [redacted] would no longer be able to be considered part of the commercial enterprise identified on the Form I-526 petition, [redacted] Any future filing must address this discrepancy.

On March 23, 2009, the director noted that the petitioner's initial business partner, [redacted] had operated restaurants under a similar name and requested evidence that the petitioner had invested in a "new" commercial enterprise. In response, counsel notes that [redacted] was organized on March 21, 2006 and asserts that the documentation of the petitioner's investment relates only to this one restaurant.

The director noted that the restaurant's logo says "1926" and the record contains a menu dated 2004. Thus, the director concluded that the petitioner had not invested in a new commercial enterprise.

In response, counsel explains that [redacted] is a restaurant "brand" and that the petitioner's former partner, [redacted] owned the U.S. rights to that brand. Counsel notes that the separation agreement includes a provision whereby [redacted] licenses the trademark, brand and business

concept to the petitioner for 15 years, allowing the petitioner to open new restaurants. Counsel further explains that the new restaurant incorporated the menu from other [redacted] restaurants and, thus, used a 2004 version of the menu.

While the unsupported assertions of counsel are not evidence, *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980), the petitioner submits ample evidence to support counsel's statements. Specifically, the petitioner resubmits the separation agreement including the license and trademark provisions on page 4 and submits (1) a letter from [redacted] confirming that the [redacted] location for [redacted] did not open until February 2007, (2) a letter and invoices from [redacted] confirming that they built the [redacted] restaurant in 2006 and 2007 and (3) a letter and lease from the [redacted] confirming that [redacted] leased the restaurant property in May 2006 and began construction shortly thereafter.

The above evidence amply demonstrates that the [redacted] the employment generating entity in this case, was built in 2006 and 2007 and opened for the first time in 2007. Thus, notwithstanding its affiliation with the 1926 [redacted] *brand*, the employment generating entity in this matter is clearly "new" as defined at 8 C.F.R. § 204.6(e).

In light of the above, we withdraw the director's conclusion that the petitioner did not invest in a "new" commercial enterprise.

INVESTMENT OF CAPITAL

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
>
> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of

generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

> (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
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> (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
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> (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
>
> (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
>
> (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner indicated on the Form I-526 petition, Part 3, that he made an initial investment of $175,000 on August 24, 2005 and that he had made a total investment of $1,029,070.84.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm'r. 1998). As stated above, the employment generating entity, [redacted] was a wholly-owned subsidiary of the new commercial enterprise, [redacted] as of the date of filing. Thus, [redacted] was part of the commercial enterprise as defined at 8 C.F.R. § 204.6(e). In addition to complying with the definition of commercial enterprise, this relationship makes it easier to demonstrate a nexus between the petitioner's investment and job creation.

The petitioner submitted the schedules K-1 accompanying [redacted] IRS Forms 1065. The petitioner's schedule K-1 for 2006 reflects a capital investment of $89,970 and a withdrawal of that

amount. In 2007, however, the petitioner's schedule K-1 reflects a capital contribution of $1,029,041. While this schedule K-1 also reflects a decrease of $577,147, that decrease purports to represent the petitioner's share of the company's losses. The separate and distinct line for "withdrawals and distributions" does not reflect that the petitioner withdrew any money in 2007. In addition, because the petitioner transferred his interest in [redacted] to [redacted] in 2007, his schedule K-1 for that year showed an ending capital balance of $0. The director noted that decrease in capital in [redacted] and the zero ending balance for the petitioner's capital in [redacted] and concluded that the petitioner had not sustained his investment.

In response, the petitioner submits a letter from [redacted] at [redacted] the firm that prepared the tax returns for [redacted] correctly notes that the schedules K-1 for BGCM show losses, not withdrawals. In addition, [redacted] explains that the petitioner's zero ending balance in [redacted] reflects the change in ownership of that company. The petitioner submits his 2008 schedule K-1 for [redacted] showing an additional contribution of $684,630 during that year.

[redacted] assertions are supported by the plain language of the schedules K-1. Thus, the schedules K-1 in and of themselves do not suggest that the petitioner has withdrawn any of his investment in [redacted] after 2006. Moreover, the petitioner's lack of interest in [redacted] would not be problematic. In fact, for the reasons stated above, had the petitioner not transferred his interest in [redacted] we would not be able to consider [redacted] as part of the new commercial enterprise. As also stated above, however, the petitioner's schedule 2008 K-1 for [redacted] suggests that [redacted] is no longer a wholly owned subsidiary of [redacted]

Nevertheless, the bank statements for [redacted] and the petitioner do support the director's ultimate conclusion that the petitioner did not maintain his investment in [redacted] The statements reflect that as of June 22, 2007, the petitioner had transferred $555,001 to [redacted] As of September 28, 2006, the petitioner had transferred $650,000 to [redacted] which went towards the construction of the restaurant. On June 28, 2007, however, [redacted] transferred $1,000,000 to the petitioner's checking account. On the same date, he transferred those funds (in two transfers of $500,000 each) to his own personal money market savings account. On July 12, 2007, the petitioner transferred the same amount (in two transfers of $500,000 each) back to his checking account. On the same date, the petitioner transferred $1,000,000 to an unknown checking account. The record contains [redacted] checking account statement for July 2007. This statement does not reflect that [redacted] was the recipient of the $1,000,000 transfer. Thus, the beneficiary of the July 12, 2007 transfer of $1,000,000 from the petitioner's checking account is undocumented.

In light of the above, regardless of the information on the petitioner's schedules K-1 for [redacted] he in fact withdrew $1,000,000 from [redacted] checking account on June 28, 2007 and did not return that money to [redacted] Thus, we uphold the director's finding that the petitioner did not maintain his investment in [redacted]

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The petition is denied.